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No. 173.

Br. of Speed, Hughes & Harr for Appellants. (on mo.)

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JAMES H. McKENNEY

Supreme Court of the United States.

October Term, 1902.

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vs.

I. T. PRYOR, I. T. PRYOR & Co., a partnership composed of I. T. Pryor, J. H. Morris and Howard Ross; C. A. Keeran, et al.

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Appeal from the Supreme Court of the Territory of Oklahoma.

BRIEF IN OPPOSITION TO MOTION TO DISMISS.

HORACE SPEED,
WM. J. HUGHES,
WM. R. HARR,
Counsel for Appellants.

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STATEMENT.

This suit was brought in the District Court of Noble County, Oklahoma Territory, by a number of individuals, firms and corporations, appellees here, against the sheriff and treasurer of that county, appellants here, to enjoin the collection of certain taxes levied against the cattle and other personal property of the plaintiffs for the year 1899, which property during that year was located on the Ponca and Otoe Indian reservations, attached to Noble County for judicial purposes.

Defendants demurred to the petition of plaintiffs, and the demurrer was sustained. Upon appeal, the Supreme

Court of Oklahoma reversed the judgment of the District Court, and directed that the injunction issue as prayed. From that judgment the defendants have appealed to this court.

QUESTION.

By an act of the Legislature of Oklahoma, passed March 5, 1895, (Laws Okla. 1895, art. 6, ch. 43,) it was provided that—

> when any cattle are kept or grazed, or any other personal property is situated in any unorganized country, district or reservation of this Territory, then such property shall be subject to taxation in the organized county to which said country, district or reservation is attached for judicial purposes.

The validity of this act was affirmed by this court in the cases of *Gay* v. *Thomas*, (169 U. S. 264,) and *Wagoner* v. *Evans*, (170 U. S. 588.)

Since that time and on March 10, 1899, (Laws Okla. 1899, p. 216,) the Legislature of Oklahoma passed the following act:

> That from and after the passage and approval of this act, no taxes shall be assessed, levied or collected in any organized country, district or reservation which shall be or which may hereafter be attached to any county for judicial purposes, except taxes for Territorial and county funds.

In imposing the taxes sought to be restrained the county officers ignored this later statute, believing the exemptions made thereby to be unlawful, and proceeded under the act of 1895. The Supreme Court of Oklahoma held, however, that the Legislature was authorized by the organic law of the Territory to pass the act of 1899. The correctness of this decision, and, if it be correct, the validity of the organic law of the Territory in that respect under the Constitution of the United States, are, therefore, the questions presented on this appeal.

I.

The first ground of the motion to dismiss—a failure to comply with rule 9 of this court—is frivolous. That rule requires the docketing of the case on or before the return day. The appeal was allowed on September 21, 1901 (Rec. 59); the citation was signed on September 28 and served on September 30 (Rec. 2), and the case was docketed in this court on October 11, within the thirty days required by the citation and by the rule.

II.

The value of the matter here in dispute exceeds the jurisdictional amount.

The judgment of the Supreme Court of Oklahoma in the present case provides:

> It is therefore ordered and adjudged by the court that the judgment of the trial court in this cause be and the same is hereby reversed; and that said cause be remanded to the lower court with instructions to enter judgment *perpetually enjoining the collection of the taxes in controversy herein*, except the taxes for Territorial and court funds, upon payment by the respective appellants of the whole amount of said taxes and penalties, if any, accrued prior to the bringing of the suits herein into court, or the payment of such taxes to the treasurer of Noble County, such payment to be evidenced to the court by the treasurer's receipt therefor. The costs of this case to be taxed to the county of Noble.

This judgment, it will be perceived, not only restrains the collection of the taxes in question for the year in question, but "perpetually." It therefore determines the *legal right* of the defendants, for all time, to collect such taxes. As to the defendants, then, that right is the matter in dispute, and its value unquestionably exceeds the jurisdictional amount. As shown by the record (page 11) the tax levy for the year 1889 against the

plaintiffs alone, after deducting the court and Territorial taxes, which were paid, is over $9,000.

The case, in this respect, comes within the rule announced in *Market Company* v. *Hoffman*, (101 U. S. 112, 113.)

Hoffman had brought a bill to enjoin the market company from proceeding to sell a stall occupied by him, and for a decree establishing his right to retain possession of the stall so long as he chose to occupy it for his business as a butcher. Subsequently the bill was amended by consent, and two hundred and five occupants of other stalls were made complainants with him. The final decree of the court enjoined the sale of the stalls of the complainants, or any of them, and also adjudged that their rights therein did not expire within a certain period. Upon appeal by the company, this court said:

> The first question to be determined is whether the amount in controversy is sufficient to give us jurisdiction of the appeal. Upon this we have no doubt. While it may be true that if Hoffman was the sole complainant, the amount in controversy would be insufficient to justify an appeal either by him or the company, the case is one of two hundred and six complainants suing jointly, *the decree is a single one* in favor of them all, *and in denial of the right claimed by the company*, which is of far greater value than the sum which, by the act of Congress, is the limit below which an appeal is not allowable. It is averred under oath in the pleadings that the sale which the company proposed to make, and the court below enjoined, would have realized to the company more than $60,000. Of this benefit the decree deprives them. It is very plain, therefore, that the appeal is one within our jurisdiction.

In this case, also, the decree is a single one in favor of all the plaintiffs, and in denial of the right claimed by the defendants to collect the taxes in question, which right, as has been shown, is of greater value than is required to give this court jurisdiction.

In the prior cases of *Gay* v. *Thomas*, (169 U. S. 264,) and *Wagoner* v. *Evans*, (170 U. S. 588,) which involved the validity of the act of the Legislature of Oklahoma of March 5, 1895, first imposing taxes on cattle and other personal property in Indian reservations attached to organized counties for judicial purposes, the jurisdiction of this court appears not to have been questioned. The *Gay* case (as appears from the record therein) was precisely like the present one, in that it was a suit by a number of individual plaintiffs, whose respective interests, as determined by the amount of taxes assessed against them individually, were below the amount required to give this court jurisdiction, but collectively aggregated more than the necessary amount. There is some ground to assume that the aggregate amount of the taxes sought to be restrained was considered the sum or value in dispute, as in stating that case the court said:

> The county clerk of said county of Kay carried the valuation of the property of these plaintiffs in error upon the tax rolls of said county, and against the same extended the levies as aforesaid, and charged against the property of these plaintiffs in error in the aggregate the sum of $26,174.16.

III.

No jurisdictional amount is, however, required, as the case involves the validity of an authority exercised under the United States.

The act of March 3, 1885, (23 Stat. 443, c. 355,) regulating appeals from the Supreme Courts of the Territories to this court, provides that an appeal or writ of error may be brought in any case, without regard to the sum or value in dispute, "in which is drawn in question the validity of . . . an authority exercised under the United States."

The question in this case is the validity, under its organic law and the Constitution of the United States, of

the act of the Oklahoma Legislature of March 10, 1899, relating to the taxation of cattle and other personal property in Indian reservations attached to organized counties for judicial purposes. It is therefore a case which involves "the validity of an authority exercised under the United States." Upon that point the decisions of this court are conclusive.

In *Clayton* v. *Utah*, (132 U. S. 632, 638,) there was involved the title to an office, one party claiming under an act of the Territorial Legislature, and the other under appointment by the Governor acting under authority conferred by the organic act of the Territory. The jurisdiction was sustained, the court, by Mr. Justice Miller, saying:

> We are therefore very clear that as the Supreme Court of the Territory of Utah based its decision upon the power conferred upon the Governor by the seventh section of the organic act of Utah to make appointments to office, this power was drawn in question, and gives the defendant Clayton a right to have the judgment of this court upon it.

In *Linford* v. *Ellison*, (155 U. S. 503, 508,) which was an appeal from a decision of the Supreme Court of the Territory of Utah, holding that a municipal corporation had no authority, under its charter, to levy a certain tax, the jurisdiction was denied, on the ground that the case did not involve the *validity*, but simply the *construction* of an act of the Territorial Legislature, Mr. Chief Justice Fuller observing:

> It is thus seen that the decision of the Supreme Court of the Territory involved the *construction* of the organic law and the scope of the authority to legislate conferred upon the Territorial Legislature; but that the *validity* of that authority and of the statute was not drawn in the question.

There can be no question, in the case at bar, that the validity, and not simply the construction, of the act of March 10, 1899, is involved.

Maricopa, &c. Railroad Co. Territory of Arizona, (156 U. S. 347, 350,) is in point. That was a proceeding under a Territorial statute to collect taxes levied by a statutory authority, but claimed to be in violation of the organic act of the Territory. Sustaining the jurisdiction, the court, by Mr. Justice White, said:

> It is insisted that the Territory *is without authority under its organic act* to extend its taxing power beyond its limits and over a reservation created by act of Congress, and that it has undertaken to do so, either directly or by including the value of the property within the reservation in its general estimate of the amount for which the company ought to be assessed. This claim, we think, presents a question within our appellate jurisdiction.

This is precisely the contention in this case—that the legislature of Oklahoma was without authority, under its organic act, to legislate in a certain direction.

IV.

The decision of the Supreme Court of Oklahoma also raises the question of the validity of the organic act of the Territory.

A further ground of jurisdiction in this case is presented by the decision of the Supreme Court of Oklahoma, holding that the Legislature of that Territory is not required by its organic law to observe the rule of uniformity in taxation, prescribed by the Constitution of the United States. (Art. I, sec. 8, cl. 1.) This raises the question of the validity, in that respect, of the act of Congress organizing the Territory.

In *Springville City* v. *Thomas,* (166 U. S. 707, 708,) there was involved the validity of a verdict of nine jurors under authority of a Territorial statute which was claimed to be in contravention of the Seventh Amendment to the Federal Constitution. In sustaining the jurisdiction the court, by Mr Chief Justice Fuller, said:

The Supreme Court of the Territory held in *Hess v. White*, 9 Utah, 61, (and the decision was followed in these cases,) that the act of Congress of September 9, 1850, (9 Stat. 453, c. 51, sec. 6,) the organic act of the Territory, vested in the Territorial Legislature such unlimited legislative power as enabled it to provide that unanimity of action on the part of jurors in civil cases was not necessary to a valid verdict. But defendants contended that the act of Congress as thus interpreted was in violation of the Seventh Amendment, and the validity of the act was in that way drawn in question. In the view which the Supreme Court took of the act it was obliged to subject it to the test of the Constitution, and accordingly in deciding that the Seventh Amendment did not require unanimity of action, the court held in effect that the act of Congress was constitutional, although it empowered the Territorial Legislature to provide for verdicts by less than the whole number of jurors. The question involved was not matter of construction of the Territorial act, but the court discussed its validity, and this depended on the validity of the act of Congress giving it the scope which the court attributed to it.

To the same effect is *Capital Traction Co.* v. *Hof*, (174 U. S. 1, 4.)

V.

To pass upon the questions presented by the motion to dismiss would require an examination of the entire record. As the case will be reached for hearing on the merits in its regular course during the term, it is submitted that the court will not make such an examination on a motion to dismiss at this late day. To do so will entail additional and unnecessary labor upon the court.

For the above reasons the motion should be denied.

HORACE SPEED,
WM. J. HUGHES,
WM. R. HARR,
Counsel for Appellants.